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Implied Waiver of Solicitor-Client Privilege is Narrow

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Solicitor-client privilege is of fundamental importance, and is therefore almost absolute. Solicitor-client privilege is more than just a formal rule of evidence – it means that inside and outside a courtroom, a person is not required to divulge the information they give to their lawyer, or the advice their lawyer gives to them.

An important exception to solicitor-client privilege arises when a party can be taken to have waived its privilege. Waiver need not be explicit – a court may find that a party has implicitly waived its privilege by making certain arguments or relying on certain facts during testimony.

In *Leggat v. Jennings*, 2015 ONSC 237, Leggat and Jennings were engaged in a dispute over several car dealerships, and negotiated a settlement agreement. Jennings later brought an action to set aside the settlement agreement based on alleged misrepresentations made during negotiations. During discovery, Leggat sought production of the legal advice Jennings obtained when entering into the settlement agreement.

Leggat argued that by stating he had relied on misrepresentations, Jennings put his state of mind into issue, and that his state of mind at the time is necessarily tied to the contents of the legal advice he received.

Justice Douglas K. Gray disagreed. Following the decision of Justice Perell of *Creative Career Systems Inc. v. Ontario*, 2012 ONSC 649, Gray J. held that a party implicitly waives solicitor-client privilege where the receipt of legal advice is relevant to a claim or defense in the lawsuit, *and* where the party who received the legal advice specifically raises the receipt of it as an issue. In most cases, merely putting one's state of mind in issue does not amount to waiver of privilege in any legal advice that was received.

In Jennings' case, arguing that he relied on Leggat's misrepresentations did not amount to a waiver of privilege.

Justice Gray also held that Jennings did not waive privilege through partial disclosure. Justice Gray held that although Jennings had voluntarily disclosed one chain of emails between himself and his lawyer, he had not waived the right to claim privilege over the remainder of his communications with his lawyer. Partial disclosure can amount to waiver when it would prejudice the other party by painting an incomplete and misleading picture. In this case, Gray J. found that the partial disclosure was not helpful to Jennings, and it was clear that Jennings was not attempting to be selective with his choice of disclosure.

This case highlights the need for clients and their lawyers to be vigilant about protecting their privilege. While solicitor-client privilege is a fundamental right and is strictly guarded, it is not absolute.

Parties should be aware that pleading a claim or defense that relies on having received legal advice may result in a waiver.

However, short of parties taking a conscious, deliberate position that necessarily calls the receipt of legal advice into question, the court continues to favour the approach of upholding solicitor-client privilege.

-Research contributed by David Shore, 2014/2015 articling student at Lenczner Slaght